IN THE HIGH COURT OF JUDICATURE OF BOMBAY

CIVIL APPELLATE JURISDICTION

APPEAL FROM ORDER NO.139 OF 2006
WITH
CIVIL APPLICATION NO.237 OF 2006
WITH
CIVIL APPLICATION NO.181 OF 2006

Shri Janardhan @ Bachha s/o
Mangalprasad Singh. ..Appellant.

V/s.

Smt. Kusum Mangalprasad Singh @ Sharma. ..Respondent.

Mr.R.G.Bhat for Ms.Lata G.Wadhwani for appellant.

Mr.K.H.Giri for respondent.

CORAM: A.M.KHANWILKAR,J

DATE : MARCH 8, 2006.

P.C. :

1. Heard counsel for the parties.

2. Admit.

3. Mr.Giri waives notice for the respondent. As short question is involved, the appeal is taken up for final disposal forthwith by consent.

4. This appeal had come up for admission on 24th February, 2006 when I had observed that parties may explore the possibility of settlement, as the dispute is between mother and son. The parties had agreed to

approach the Mediator appointed under the said order. However, it transpired that mediation is not being pursued instead the parties continued to precipitate the matter inspite of the order of status quo passed by this court on that date. It is stated before this court on affidavit that the respondent has registered false criminal complaint not only against the appellant but also against his wife and minor children, falsely implicating them of the alleged threat given to the respondent. In this background, as the parties are not willing to even discuss about the modalities of settlement, if any, it was thought appropriate to proceed with the hearing of this appeal itself.

5. Briefly stated, the respondent mother has filed suit before the City Civil Court at Bombay being Suit No.4802 of 2005 for permanent injunction against the appellant. In the said suit the respondent took out Notice of Motion No.4207 of 2005 for issuing temporary injunction restraining the appellant from disturbing peaceful possession of the respondent or from dispossessing or entering into the suit premises being Flat No.3, ground floor, Krishna Kunj Building, Golibar 7th Road, Santacruz(E), Mumbai-400 055, without her consent and permission.

The trial court by the the impugned Judgment and Order has made the said Notice of Motion absolute and restrained the appellant in terms of the reliefs claimed by the respondent. According to the respondent/plaintiff, she is the tenant in respect of the suit premises and that the appellant/defendant has no concern with the said premises and was forcing his entry in the said premises against her wishes. Besides, the appellant/- defendant was causing unpleasant situation in the suit premises.

6. The case of the appellant /defendant on the other hand is that the respondent/plaintiff was not the real tenant. The original tenant was father of the appellant who died in the year 1996. On the date when the original tenant died in 1996, the appellant was also in occupation of the suit premises as member of his family. In substance, the case made out is that by virtue of Section 5(11)(c) of the Bombay Rent Act, 1947, he would step into the shoes of the main tenant and inherited the tenancy alongwith other family members who were occupants of the suit premises. It is also the case of the appellant that even now the appellant is in physical possession of the suit premises. Interestingly, the court below has accepted this plea of the appellant, as can be

discerned from the findings recorded in paragraph-5 of the impugned Judgment which reads thus:

> "Even though the Defendant is in physical possession of the suit premises alongwith the Plaintiff, he can not claim possession of the suit premises."

In other words, the factum of physical possession of the suit premises of the appellant/defendant is not doubted by the trial court. However, the trial Court proceeded to observe that the rent receipts are issued in favour of the respondent/plaintiff for which reason she is the tenant of the suit premises. Whereas there was no record to support the plea of the appellant that he was also tenant in the suit premises. On that basis, the trial Court proceeded to hold that the appellant has no legal title in the suit premises and cannot obstruct true owner or the title holder of the premises.

7. In my opinion, the approach of the trial court is manifestly wrong. Once it is found that the appellant was in possession of the suit premises alongwith the other family members on the date of the death of original tenant, namely, father of the

appellant, then, in law, it necessarily follows that the appellant has inherited tenancy alongwith other family members. The fact that the rent receipt is issued only in the name of respondent mother will not rob the appellant of his right, which has enured to him in 1996 on the death of his father. Besides, the trial Court has observed in paragraph-5 as is reproduced earlier that the appellant defendant is in physical possession of the suit premises alongwith respondent/Plaintiff. On this finding, the question of passing order, one of the nature passed by the trial Court which is impugned in this appeal, is completely ruled out and such order cannot be sustained either on facts or in law.

8. Counsel for the respondent however, contends that there was material on record to support the plea of the plaintiff that, as a matter of fact the appellant/defendant was residing in some other premises and was not in physical possession of the disputed premises when the order of injunction came to be passed. He submits that these materials are already part of the record before the lower Court. The fact remains that the court below has not reckoned such material, whereas the Court below has recorded finding of fact against the

respondent/plaintiff. Counsel for the respondent has also placed reliance on the decision of the Apex Court reported in **AIR 1972 S.C.2299 in the case of M. Kallappa Setty V/s.M.V.Lakshminarayana Rao** to contend that since the plaintiff was in possession of the suit property, on the strength of her possession, she can resist interference from defendant who has no better title than herself and get injunction restraining defendant from disturbing her possession. The observations made by the Apex Court are relevant with regard to the fact situation of the case before that court. In so far as the present matter is concerned, besides common law, the issue will have to be considered also keeping in mind the provisions of Bombay Rent Act. The court will have to take into account whether the appellant has any right, whatsoever, in the suit premises. If some right has been created in favour of the appellant after the death of his father on account of the fact that he was in occupation of the suit premises as a family member at the relevant time, then the efficacy of such right will have to be considered. It is only if the court were to hold that the Respondent Plaintiff had a better title or right than the Appellant the principle stated in the decision of the Apex Court referred to above may come into play. Similarly,

even if the court were to hold that the appellant is presently not in physical possession of the suit premises and residing elsewhere yet was causing obstruction to the peaceful enjoyment of the possession of the suit premises of the plaintiff, in that case the court may consider passing appropriate order.

9. As is observed earlier, the trial Court has not adverted to any documentary evidence pressed into service by both the sides before recording a clear finding of fact that the appellant/defendant was not in physical possession of the suit premises on the date when the impugned order of injunction came to be passed nor any adjudication has been done as to what is the right of the appellant on account of the fact of being in physical possession of the suit premises as family member of the original tenant at the time of death of the original tenant in 1996. All these matters will have to be properly scrutinized by the trial court.

10. In the circumstances, this appeal succeeds. The impugned Judgment and order is set aside and instead the Notice of Motion No.4207 of 2005 is restored to the file of the trial court to its

original number to be decided afresh in accordance with the law in terms of observations made herein before.

11. Till the disposal of the Notice of Motion, the parties are directed to maintain status quo with regard to the suit premises, which means that till positive finding is reached by the trial court that the appellant/defendant is not in physical possession of the suit premises and is staying alongwith his wife and children in some other premises, the appellant and his family member will be entitled to avail of the peaceful possession of the suit premises alongwith the respondent/plaintiff. Both the parties will ensure that no untoward situation takes place in the suit premises and none of the parties will rush to the police station on some flimsy allegation.

12. Having regard to the nature of controversy involved, the trial court is directed to decide the Notice of Motion expeditiously, preferably by the end of March, 2006. Both sides assure through their counsel that they shall extend full cooperation to the trial Court for early disposal of the Notice Motion and not seek adjournment on any count. That assurance is accepted. The pleadings and documents

which are already filed on record will be the basis to decide the Notice of Motion. Parties to appear before the trial Court on 14th March, 2006 when the trial Judge will hear the Notice of Motion finally or pass necessary directions for hearing thereof.

13. At this stage, counsel for the appellant has brought to my notice that the respondent has locked the premises and is not permitting the appellant to enter or occupy the same alongwith his family. In view of the observations made earlier, the respondent shall forthwith remove the lock in the course of the day, failing which the appellant will take assistance of the local police station and break open the lock on the suit premises tomorrow at 11 a.m.. This course is adopted because at present there is finding of fact recorded by the trial court, which is in favour of the appellant that he is in physical possession of the suit premises alongwith the plaintiff. It is therefore, observed in the earlier part of the order that till the trial court records "positive finding" that the appellant is not in physical possession of the suit premises, the appellant and his family will be entitled to enjoy peaceful possession of the suit premises.

14. The local police station is directed to offer necessary assistance to the appellant for removal of the lock by tomorrow at 11 a.m., if the same is not removed by the respondent/plaintiff on her own. The respondent/plaintiff if so desires, may remain present at the suit premises at 11 a.m. tomorrow.

15. The Police officials will act on the authenticated copy of this operative order to be issued under the signature of the Sheristedar of this court.

16. At this stage, counsel for the respondent/plaintiff states that wrong representation is made on behalf of the appellant that premises have been locked by the respondent and she has gone away from the suit premises. According to the counsel for the respondent, the respondent is in physical occupation of the premises and premises are not locked but open for occupation and if the appellant so desires he may visit and stay in the premises alongwith his family till further appropriate orders are passed by the trial court. That assurance is accepted.

16. In view of this order, nothing survives in

the companion civil applications. The same is disposed of.

17. The Co-Ordinator ADR shall inform Mrs.K.K.Baam, retired Judge of this court that the appeal has been finally disposed of in view of subsequent developments as recorded in the order. In any case, if the parties approach for mediation, it will be open to the Mediator to proceed in the matter and submit formal report in the proceedings pending before the trial court to facilitate the trial court to pass appropriate order.

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Mr.K.H.Giri for respondent.

CORAM: A.M.KHANWILKAR,J

DATE : MARCH 8, 2006.

P.C. :

1. For the reasons separately dictated in open court, following operative order is passed.

. In the circumstances, this appeal succeeds. The impugned Judgment and order is set aside and instead the Notice of Motion No.4207 of 2005 is restored to the file of the trial court to its original number to be decided afresh in accordance with the law in terms of observations made herein before.

. Till the disposal of the Notice of Motion, the parties are directed to maintain status quo with regard to the suit premises which means that till positive finding is reached by the trial court that the appellant/defendant is not in physical possession of the suit premises and is staying alongwith his wife and children in some other premises, the appellant and his family member will be entitled to avail of the peaceful possession of the suit premises alongwith the respondent/plaintiff. Both the parties

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